from E.I. Sdn. Bhd. (EISB). The question for determination is whether the assessments were correctly made having regard to the Double Taxation Relief (United Kingdom) Order, 1973 (P.U.(A) 241/73) and to section 4(a) of the Act.

The relevant facts are briefly as follows. EIL was incorporated in the United Kingdom and, for the purposes of Malaysian Income Tax, is resident there and has no permanent establishment in Malaysia. On May 9, 1973 it entered into an agreement with a Malaysian company, Plantations Agencies Sdn. Berhad, to set up EISB in Malaysia with its registered office in Penang for the purpose of manufacturing catheters. This agreement (AB23) provides, *inter alia*, for EIL to appoint three directors to the board of EISB and for these directors and for other EIL employees to provide managerial, planning, training, technical, operational, marketing and development services to EISB. In the result, EISB paid to EIL the following amounts as managerial fees: —

Period	*Amount*
From 1.6.73 to 31.12.73	$35,217.00
Year ending 31.12.74	56,134.00
Year ending 31.12.75	49,152.00.

DGIR treated these payments as royalties within the definition of section 2 of the Income Tax Act, 1967 and accordingly made assessments on EIL under section 4(d). EIL challenged these assessments but the Special Commissioners decided that the payments were royalties as defined by section 2 of the Act and that they were correctly charged to income tax under section 4(d).

In the appeal before me it was common ground that the payments were management fees which were paid to a company resident in the United Kingdom with no permanent establishment situated in Malaysia. It was also common ground that the sums paid were royalties within the definition of section 2 of the Act as amended on March 1, 1973 effective for the year of assessment 1973 but were not so within the definition of paragraph 3 of Article XI of the Relief Order which specifically declares that the agreement entered into between the Government of Malaysia and the Government of the United Kingdom and Northern Ireland was made "with a view to affording relief from double taxation in relation to Malaysian tax and United Kingdom tax" as defined in the agreement which was reproduced in the Relief Order and came into effect on July 25, 1973 although signed on March 30, 1973 "as respects Malaysian tax for any year of assessment beginning on or after January 1, 1973" (See Article XXVI(1)(a)). Whatever the sequence of the coming into effect of section 2 of the Act and of the Relief Order, by virtue of section 132(1) of the Act which reads as follows —

"If the Minister by statutory order declares that —

(a) arrangements specified in the order have been made by the Government with the government of any territory outside Malaysia with a view to affording relief from double taxation in relation to tax under this Act and any foreign tax of that territory; and

(b) it is expedient that those arrangements should have effect,

then, so long as the order remains in force, those arrangements shall have effect in relation to tax under this Act notwithstanding anything in any written law."

it is obvious that the provisions of the Relief Order during its currency would override those of the Act in favour of its beneficiaries. I do not think it can be disputed that the payments to EIL as management fees were in fact income to EIL for the management services it provided to EISB in compliance with Clause 5 of the Heads of Agreement entered into between EIL and PASB on May 9, 1973 for the establishment of EISB (See AB23). Article VI of the Relief Order provides: —

"1. The income or profits of an enterprise of one of the Contracting States shall be taxable only in that Contracting State, unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, tax may be imposed in that other Contracting State on the income or profits of the enterprise but only on so much thereof as is attributable to that permanent establishment.

2. ....

3. ....

4. ....

5. Where income or profits include any item or profits which is dealt with separately in another Article of this Agreement, the provisions of that other Article shall not be affected by the provisions of this Article."

Since the definition of "royalties" in Article XI does not apply it is clear by virtue of paragraph 1 above that any income of EIL is taxable only in the United Kingdom since it does not carry on business in Malaysia through a permanent establishment situated therein. As the provisions of the Relief Order bear no ambiguity and as it applies in this case, I do not consider that it was appropriate to call in aid the extraneous, presumptive provisions of section 15(b) of the Act without which, it seems to me, DGIR would not have been able to charge tax on this income of EIL under the provisions of section 4. I am accordingly of the view that the decision of the Special Commissioners confirming the assessments made by DGIR is wrong in law.

The appeal is allowed with costs.

Appeal allowed.

Solicitors: *Skrine & Co.*

BONG MIEW v. PATRICK TING

[O.C.J. (Yusoff Mohamed J.) January 23, 1980]
[Kuching — Civil Suit No. K.138 of 1975]

Tort — Negligence — Damages — Road accident resulting in death of pedestrian — Res ipsa loquitur plea by plaintiff — Whether doctrine applicable — Civil Law Act 1956.

The plaintiff in this case was the husband and administrator of the deceased's estate. He claimed for damages under the Civil Law Act 1956 arising out of a motor vehicle accident which resulted in the death of his wife. The motor car involved was driven by the defendant. The statement of claim alleged that the deceased was crossing the road after having been discharged from a bus when she was knocked down by the motor-car coming from behind the bus which said motor car was negligently driven by the defendant. The plaintiff relied on the doctrine of *res ipsa loquitur*. The defence alleged that the deceased had negligently run across the road causing the accident.

Held, dismissing the plaintiff's claim: (1) there was no evidence of negligence on the part of the defendant. On the other hand there was evidence that the deceased was in a hurry when she left the waiting bus to cross the road;

(2) the sketch plan revealed that the defendant had given a wide berth while overtaking the bus. The road at that point was 24 ft. 10 in. wide and within that width a reasonably competent driver could avoid a pedestrian walking across the road, if the deceased had done so;

(3) on the pleadings and the evidence adduced the doctrine of *res ipsa loquitur* had no application to the present case "where the cause of the accident was known."

Case referred to:-

(1) *Lai Kuit Seong* v. *Public Prosecutor* [1969] 1 M.L.J. 182, 183, F.C.

CIVIL SUIT.

Bong Ban Chong for the plaintiff.

Anthony Tai for the defendant.

Cur. Adv. Vult.

Yusoff Mohamed J.: This is a claim for damages under the Civil Law Act of 1956 arising out of a motor vehicle accident occurred on September 27, 1973 at about 3.30 p.m. at Sokaka/Pending, Kuching By-Pass. The accident involved the deceased Chong Nou (*f*) and motor-car No. KA9272 driven by the defendant. Chong Nou died on the same day resulting from the accident. The plaintiff was the husband and now administrator of the deceased's estate.

The statement of claim alleged that the deceased was crossing the road after having been discharged from a bus when she was knocked down by the motor-car coming from behind the bus which said motor-car was negligently driven by the defendant. In alleging negligence the plaintiff relied on the doctrine of *res ipsa loquitur*. On the contrary the defence alleged that the deceased had negligently run across the road causing the accident.

The evidence shows that on that day the deceased and her husband, the plaintiff, had visited their son's house at Kenyalang Park and at about 3.30 p.m. they were waiting for a bus to return to Bau, some 30 miles away. When the bus came and while the deceased was boarding the bus, she suddenly remembered she had left something at her son's house. Her son's house was across the road from where the bus stopped and situated diagonally towards the rear of the bus.

In trying to return to her son's house the deceased alighted from the bus quickly, went fast towards the front of the bus and crossed the road. At that moment the plaintiff heard the sound of impact and when he went to the scene, he saw the deceased body was lying infront of the defendant's motor-car. The whole incident, according to the plaintiff, happened in less than two seconds.

From these facts, I find that there is no evidence of negligence on the part of the defendant. The collision took place while the deceased was crossing the road. After having rushed down the bus, the deceased must have run across the road without heed of the oncoming motor-car from the rear of the bus, in order to retrieve what she had forgotten at her son's house, and to return to the waiting bus as quickly as she could. There is evidence that she was in a hurry to return to Bau and the fact that the plaintiff was waiting in the bus indicated that she was determined to return and that she would not want to miss the bus. In those circumstances it was most probable that the deceased had run into the oncoming motor-car and she was wholly responsible for the collision.

The sketch plan though not produced in evidence, shows that the defendant had given a wide berth while overtaking the bus. He was practically travelling on the opposite side of the road from the bus. The road at that point was 24 ft. 10 in. wide and within that width a reasonably competent driver could avoid a pedestrian walking across the road, if the deceased had done so.

Another noticeable factor from the sketch plan is the starting point of the brake mark which began from just behind the stationary bus. Unfortunately no measurement was taken of the actual distance. But this indicates the point at which the defendant applied his brakes when he first saw the deceased running across the road. The distance from him to the deceased at that time could only be slightly more than the length of the bus itself. Within that distance he could not possibly avoid the collision with the deceased. Although the brake marks shows that the motor-car travelled a distance of 88 ft. 8 in. before it came to a stop, this factor alone cannot indicate that the defendant was speeding at the time of collision having regard to the fact that the road was wet at the time of the accident — see bundle of agreed facts, though also not produced in evidence.

The plaintiff pleaded the doctrine of *res ipsa loquitur* in the statement of claim, but his counsel did not choose to rely on this pleading during the trial. It was not known whether he sought to abandon this pleading. However, in my view, on the pleadings and the evidence adduced the doctrine has no application. In *Lai Kuit Seong* v. *Public Prosecutor*[1] the court in *obiter* states that the doctrine:

"does not apply where the cause of the accident is known ... the *res* speaks because, and only because, where the accident stands unexplained, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened ... conversely, *res ipsa loquitur* cannot be relied on where the *res* is ambivalent."

In these circumstances, the plaintiff's claim is dismissed with costs.

Claim dismissed.

Solicitors: *Sim & Yee; Anthony Tai.*